IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09/02/2004

CORAM

THE HONOURABLE MRS. JUSTICE R.BANUMATHI

CRL.APPEAL No.816 of 1996

M/s.Sarathy Enterprises,
by its Manager,
Rajendran ... Appellant

-Vs-

Selvaraj ... Respondent.

Criminal Appeal against the judgment dated 27.03.1996 made in C.C. No.216 of 1994 on the file of Judicial Magistrate No.1, Namakkal, Salem District.

!For appellant : Mr. R.Rajan

^For respondent : Mr.K.Raman Raj.

:J U D G M E N T

The Complainant in C.C.No.216 of 1994 on the file of Judicial Magistrate No.1, Namakkal is the Appellant. Aggrieved by the order of acquittal, acquitting the Respondent / Accused under Sec.138 Negotiable Instruments Act, the Complainant has preferred this appeal.

2. The facts which led to the present appeal could briefly be stated thus:- The complaint is filed on behalf of M/s.Sarathy Enterprises alleging that one Jayaraman, his wife Sheela and the Accused approached the Complainant for loan facilities and borrowed a sum of Rs.60,000/- on 19.06.1993 from the Complainant for their business and other expenses. Further case of the Complainant is that in order to repay the loan borrowed, the said Jayaraman had issued a cheque dated 18.04 .1994 drawn on Canara Bank, Thathiyangarpet Branch, which was returned for 'insufficiency of funds'. Thereafter, the Complainant approached the said Jayaraman. That apart, the Complainant has also approached the Accused explaining the position and the Accused is said to have issued Ex.A.1 cheque (dated 08.07.1994) bearing No.792017 drawn on Trichirappalli District Cooperative Bank, Thathiyangarpet Branch for Rs.60,000/-. Ex.A.1 cheque was presented for collection on 08.07.199 4 in Karur Vysya Bank, Namakkal, which was returned with an endorsement 'not arranged for'. After issuing notice, the Complainant had filed the complaint against the Accused.

3. To substantiate the averments made in the complaint and that the amount is payable by the Accused and that the cheque was returned for insufficiency of funds, the Complainant has examined himself as P. W.1. P.W.2 - Manager of Karur Vysya Bank was also examined. In his evidence, P.W.1 - the Complainant has spoken about the borrowal by Sheela. The Complainant has further spoken about the issuance of Ex.A.1 cheque (dated 08.07.1994) by the Accused for Rs.60,000/- drawn on Cooperative Bank, Thathiyangarpet Branch and about the return of the cheque. Similarly, P.W.2 - Manager of the Karur Vysya Bank has also spoken about the presentation of the cheque and the insufficiency of funds in the Account of the Accused.

4. Upon consideration of the evidence, learned Judicial Magistrate acquitted the Accused mainly on two grounds:-

(i) there was no legally enforceable debt by the Accused towards the Complainant;

(ii)the complaint was not properly instituted with proper authorisation from M/s.Sarathy Enterprises;
The trial Court also raised doubts about the proper authorisation of the Complainant to lodge the complaint. Aggrieved over the acquittal, Complainant / Appellant has preferred this appeal.

5. The learned counsel for the Complainant/ Appellant has submitted that issuance of Ex.A.1 cheque would give rise to the presumption under Sec.139 Negotiable Instruments Act. Learned counsel has laid emphasis upon Ex.A.1 cheque (dated 08.07.1994) and Ex.D.2 reply notice sent by Jayaraman, Sheela and the Accused, wherein the Accused is said to have admitted his liability, which was not properly considered by the trial Court. Drawing attention of the Court to Ex.A.6 - Authorisation, the learned counsel further submitted that Ex.A.6 was produced into the Court during the cross examination of P.W.1 and the trial Court erred in saying that such filing of authorisation letter would not validate the complaint.

6. Countering the arguments of the Complainant / Appellant, the learned counsel for the Respondent / Accused submitted that absolutely there is no evidence connecting the Accused with the loan transaction of Jayaraman and Sheela. It is further submitted that when the subsisting liability by the Accused is not proved, the trial Court has rightly taken into consideration that no debt is due from the Accused and rightly dismissed the complaint. Further, mentioning the stage in which Ex.A.6 was filed, the learned counsel submitted that when the complaint was originally filed without any proper authorisation, the belated filing of authorisation would not in any way validate the complaint and the same was rightly taken note of by the trial Court.

7. Upon consideration of the submissions by both counsel and the judgment of the trial Court, the following points arise for consideration in this appeal:-

(i) Whether legally enforceable subsisting liability of the Accused is

proved by the Complainant ?

(ii) Whether the complaint is validly instituted ?

8. Strict liability under Section 138 can be enforced only when the cheque is issued in discharge of any legally enforceable debt or other liability, partly or wholly. Where a cheque is issued not for the purpose of discharge of any debt or other liability, return of such cheque unpaid will not meet with the penal consequences and the maker of the cheque shall not, therefore, be liable for prosecution. For example, if the cheque is given by way of a gift or present and if the bank dishonours it, the maker of the cheque is not liable for prosecution. Explanation to Section 138 provides that a debt or liability under this section means only a legally enforceable debt or other liability. In common parlance, a debt is something owed to another, a liability, an obligation, a chose in action, which is capable of being assigned by creditor to some other person. A debt is a sum of money which is now payable or will become payable in future by reason of present obligation. A debt due means that a particular liability is in existence. In order to find out that there is liability or debt or the transaction reflects the debt, the Complainant is to establish that...

(i) there is relationship of debtor and creditor between the parties;
(ii) the debt must be an existing one, the payment of which does not depend upon happening of some contingency.
In the light of the above, it is relevant to examine the allegations in the complaint to know whether the Complainant / Appellant has proved that the Respondent / Accused has "debt payable" and whether there is debt payable in existence.

9. Admittedly, the loan transaction between the Complainant / Appellant and Sheela, wife of Jayaraman was in the year 1993, i.e. on 19.0 6.1993. The said Sheela is said to have borrowed a sum of Rs.60,000/-. According to the Complainant, the Accused had given the cheque for that debt payable by Sheela. In the complaint, absolutely there is no allegation in what capacity and for what purpose the Accused had issued Ex.A.1 cheque. In the complaint only vague averments are made that " the accused explaining the position. The accused later accepting the situation issued his cheque No.792017..." Ex.A.1 cheque is said to have been issued by the Accused on 08.07.1994, i.e. nearly ten months after the loan transaction. Obviously, Ex.A.1 cheque was not issued at the time of borrowal of the loan. In his evidence, P.W.1 has stated that the Accused had signed in the promissory note while Sheela borrowed the amount. If that be so, only the promissory note said to have been signed by the Accused could form a security and certainly not Ex.A.1 cheque. When Ex.A.1 cheque was not issued as a collateral security for the loan, there cannot be said to be debt or subsisting liability by the Accused towards the Complainant. When the Accused is neither proved to be the guarantor nor Ex.A.1 cheque is proved to have been issued as a collateral security for the loan transaction, it cannot be said that Ex.A.1 cheque was issued to discharge the subsisting liability.

10. The issue could be viewed from another angle also. No evidence is adduced that the loan payable by Jayaraman and Sheela remains subsisting. Ex.D.2 is the reply notice sent by Jayaraman, Sheela and the Accused on 18.10.1995 in response to the notice issued by the Complainant on 29.09.1995, calling upon them to pay the amount. The demand for payment of the loan amount by issuance of notice in the year 19 95 cannot be connected to Ex.A.1 cheque, which is said to have been issued on 18.04.1994. That apart, absolutely there is no evidence showing as to how much amount is due from the said Jayaraman and Sheela. It is stated that for recovery of the amount from Jayaraman and Sheela, a Civil Suit is filed. That being so, Ex.A.1 cheque cannot be connected with the loan transaction, which is of the year 1993.

11. The learned counsel for the Complainant / Appellant has drawn the attention of the Court to Ex.D.2 reply notice, where the Accused is said to have admitted his liability, which according to him would sufficiently prove the subsisting liability payable to the Complainant. In Ex.D.2, it is stated that " ,e;epiyapy; j';fs; fl;rpf;fhuh;fs; j';fs; fl;rpf;fhuhplk; 19/06/1993k; njjpapy; U:/60.000 f;F kl;oYk; xnu jlitjhd; fld; bgw;Ws;sdh;/ ic& fldpw;fhf ek; 2 yf;f fl;rpf;fhuh; 1 8/04/1994k; njjpapy; fhnrhiy bfhLj;J ,Uf;Fk; epiyapy; /// " It is to be noted that Ex.D.2 is the reply notice given by Jayaraman, Sheela and the Accused in response to the notice sent by the Complainant on 29.09.1995. The contents in the reply notice cannot exclusively be attributed to the Accused wherein he is said to have admitted the liability. Cheque referred in Ex.D.2 notice is dated 18.04.1994; whereas Ex.A.1 cheque is dated 08.07.1994. The cheque mentioned in Ex.D.2 notice cannot be connected to Ex.A.1. That apart, even if there is any admission in Ex.D.2 reply, that cannot be taken back to Ex.A.1 cheque (dated 18.07.1994).

12. Section 138 Negotiable Instruments Act gets attracted only when the cheque is issued in discharge of the subsisting debt or liability. Absolutely there is no averment in the complaint that the cheque was issued in discharge of the subsisting liability. (i) transaction between the Accused and the Complainant is not proved excepting one instance of Ex.A.1 cheque; (ii) subsisting liability / debt from the Accused is not proved. The complaint and the evidence on record are bereft of essential ingredients to a ttract Sec.138 Negotiable Instruments Act. The learned Magistrate has rightly dismissed the complaint, warranting no interference.

13. The complaint was not filed with proper authorisation from the Complainant firm / M/s. Sarathy Enterprises is yet another ground for dismissal of the complaint. Before the trial Court, P.W.1 was examined. After his examination was completed, again on 12.01.1996 he was recalled and Ex.A.6 - authorisation was produced showing that he was authorised to file the complaint. Belated filing of the authorisation (Ex.A.6) cannot in any way validate the lodging of the complaint without proper authorisation.

14. This appeal is preferred against the order of acquittal. It is only in rare cases of injustice resulting from violation of fundamental principles of law, the High Court is empowered to set aside the acquittal. As discussed earlier, the complaint and the evidence on record are bereft of essential particulars to attract Sec.138 Negotiable Instruments Act. No substantial ground is made out warranting interference in the order of

acquittal by the trial Court.

15. For the reasons stated above, this appeal is dismissed.

Index:yes
Internet: Yes

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To

1. The Judicial Magistrate No.1,
Namakkal, Salem District.